

PETER P. MARTINEZ,  
Plaintiff,  
v.  
MICHAEL J. ASTRUE, Commissioner  
of Social Security,  
Defendant.

No. CV-10-0363-CI  
ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND ORDERING REMAND FOR AN  
AWARD OF BENEFITS

**JURISDICTION**

On June 12, 2006, Plaintiff protectively filed a Title II application for a closed period from January 20, 2004, through June 30, 2008, for disability and disability insurance benefits. (Tr. 10; 23.) He also filed a Title XVI application for supplemental security income for the same closed period. (Tr. 96.) He alleged disability due to obsessive compulsive disorder, panic disorder, and major depression with OCD. (Tr. 100.) Plaintiff's claim was denied

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1 initially and on reconsideration, and he requested a hearing before  
2 an administrative law judge (ALJ). (Tr. 57-68.) A hearing was held  
3 on September 30, 2008, at which Vocational Expert Daniel McKinney,  
4 and Plaintiff, who was represented by counsel, testified. (Tr. 20-  
5 52.) ALJ Robert S. Chester presided. (Tr. 20.) The ALJ denied  
6 benefits on October 21, 2008. (Tr. 10-19.) The instant matter is  
7 before this court pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript  
10 of proceedings and are briefly summarized here. At the time of the  
11 hearing, Plaintiff was 28 years old. (Tr. 27.) He lived in a  
12 mobile home with his parents, and had a driver's license. (Tr. 27-  
13 28.) When he was a teen, his parents moved from Walla Walla to  
14 Ephrata to get Plaintiff away from a street gang. (Tr. 332-33.)  
15 Plaintiff completed high school and one and one-half years of  
16 computer training, but he had to quit because he could no longer  
17 drive due to his increasingly severe anxiety attacks. (Tr. 28-29.)  
18 Plaintiff stopped working at a pizza restaurant and later at an auto  
19 express-lube store because he felt more and more frequently anxious,  
20 "almost like a claustrophobic feeling," and he believed he was about  
21 to "break down all the time." (Tr. 32-33.) Plaintiff testified  
22 that he tried to "stick it out and toughen it up," but his anxiety  
23 and panic overwhelmed him and he could no longer work. (Tr. 34.)  
24 Plaintiff described the problems he had with driving:

25 I would start to basically get severe anxiety attacks  
26 especially like at stoplights. For some reason the heat  
27 - if it was like summertime the heat would really trigger  
28 an anxiety attack. And it wasn't only a physical anxiety  
attack, it was also a mental anxiety attack and that's  
what made it, you know, 10 times worse. I mean, I felt  
like I wanted to get out of the car and run and scream,

1 you know, because of the way I felt. It was just too  
2 unbearable. And also, you know, after that just little  
3 things started you know, affecting me and becoming big  
4 things such as you know, every time I hit a speed bump or  
5 I went over a hole I would start to feel like I hit  
6 somebody and I would have to go back and check and go back  
7 in circles. And it was just bad, that feeling and that  
8 whole mental process.

9 (Tr. 36.)

10 Plaintiff experienced this everyday. (Tr. 37.) He also  
11 experienced problems with his OCD habits, including constant  
12 paranoia about germs on his hands, checking and re-checking doors,  
13 locks and "everything" ten or fifteen times, and when he saw the  
14 color red, he would "freak out" and that experience affected his  
15 entire workday. (Tr. 34-38.) Plaintiff had hallucinations. (Tr.  
16 41.) Plaintiff reported that he believed that people were talking  
17 about him, laughing at him and that something was wrong with him.  
18 (Tr. 39.) As a result, he isolated himself. (Tr. 39.) In July  
19 2008, Plaintiff began working the front counter at an athletic club.  
20 (Tr. 29-30.) He smokes two or three cigarettes per day, and is  
21 trying to quit. (Tr. 35.) Plaintiff reported that Lorazepam and  
22 Paxil helped his OCD symptoms, and therapy and exercise helped him  
23 as well. (Tr. 35; 37.) Plaintiff requested a closed period of  
24 consideration for disability from January 20, 2004, ending June 30,  
25 2008. (Tr. 10; 23.)

#### 26 ADMINISTRATIVE DECISION

27 ALJ Chester found Plaintiff's date of last insured for DIB  
28 purposes was June 30, 2004. (Tr. 10.) At step one, he found  
29 Plaintiff had not engaged in substantial gainful activity since  
30 January 20, 2004. (Tr. 12.) At step two, he found Plaintiff had  
31 severe impairments of "Depression, Obsessive-Compulsive Disorder,

1 Panic Disorder without Agoraphobia and Personality Disorder." (Tr.  
2 12.) At step three, the ALJ determined Plaintiff's impairments,  
3 alone and in combination, did not meet or medically equal one of the  
4 listed impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R.  
5 §§ 416.920(d), 416.925 and 416.926). (Tr. 13.) In his step four  
6 findings, the ALJ found Plaintiff's statements regarding pain and  
7 limitations were not credible to the extent they were inconsistent  
8 with the RFC findings. (Tr. 16.) He found that Plaintiff retained  
9 the RFC "to perform a full range of work at all exertional levels  
10 but with the following nonexertional limitations: superficial  
11 contact with the general public and limited collaboration with  
12 coworkers." (Tr. 15.)

13 ALJ Chester found Plaintiff could perform his past work as a  
14 cashier, kitchen helper, and sales clerk. (Tr. 18.)

#### 15 STANDARD OF REVIEW

16 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
17 court set out the standard of review:

18 A district court's order upholding the Commissioner's  
19 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
20 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
21 Commissioner may be reversed only if it is not supported  
22 by substantial evidence or if it is based on legal error.  
23 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
24 Substantial evidence is defined as being more than a mere  
25 scintilla, but less than a preponderance. *Id.* at 1098.  
26 Put another way, substantial evidence is such relevant  
27 evidence as a reasonable mind might accept as adequate to  
28 support a conclusion. *Richardson v. Perales*, 402 U.S.  
389, 401 (1971). If the evidence is susceptible to more  
than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
*Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed



1 claimant can make an adjustment to other work; and (2) specific jobs  
2 exist in the national economy which claimant can perform. *Batson v.*  
3 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).  
4 If a claimant cannot make an adjustment to other work in the  
5 national economy, a finding of "disabled" is made. 20 C.F.R. §§  
6 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

### 7 ISSUES

8 Plaintiff contends that the ALJ erred by applying the incorrect  
9 legal standard, and that decision is not supported by substantial  
10 evidence. (ECF No. 14 at 3-4.) Plaintiff also contends that the  
11 hypotheticals posed to VE were flawed. (ECF No. 14 at 9.)  
12 Defendant contends the ALJ's decision is supported by substantial  
13 evidence and free of legal error. (ECF No. 17.)

### 14 DISCUSSION

#### 15 1. Substantial evidence.

16 Plaintiff contends that the ALJ's decision is not supported by  
17 substantial evidence. (ECF No. 14 at 4.) The court reviews the  
18 ALJ's decision denying plaintiff disability benefits to determine if  
19 the findings are supported by substantial evidence and whether the  
20 ALJ used the proper legal standards in reaching the decision. 42  
21 U.S.C. § 405(g); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
22 1999); *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998).  
23 "Substantial evidence means such relevant evidence as a reasonable  
24 mind might accept as adequate to support a conclusion." *Morgan*, 169  
25 F.3d at 599; *Meanel*, 172 F.3d at 1113. Substantial evidence is  
26 "more than a mere scintilla but less than a preponderance." *Tidwell*  
27 *v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998); *Reddick*, 157 F.3d at  
28 720.

1 In determining whether the ALJ's findings are supported by  
2 substantial evidence, the court reviews the administrative record as  
3 a whole, weighing both the evidence that supports and the evidence  
4 that detracts from the ALJ's conclusion. *Reddick*, 157 F.3d at 720.  
5 "If the evidence can reasonably support either affirming or  
6 reversing the [ALJ's] conclusion, the court may not substitute its  
7 judgment for that of the [ALJ]." *Reddick*, 157 F.3d at 720-21.

8 An ALJ is required to consider all of the evidence available in  
9 a claimant's case record, including evidence from medical sources.  
10 42 U.S.C. § 423(d)(5)(B); see also 20 C.F.R. § 404.1527(d)  
11 ("Regardless of its source, we will evaluate every medical opinion  
12 we receive."). The term "medical sources" refers to both  
13 "acceptable medical sources" and other health care providers who are  
14 not acceptable medical sources. See 20 C.F.R. §§ 404.1502 and  
15 416.902. In addition to evidence from the acceptable medical  
16 sources, the ALJ is required to review evidence from other sources  
17 to establish the severity of a claimant's impairments and how it  
18 affects the claimant's ability to work. 20 C.F.R. § 404.1513(d).

19 The opinion of an examining physician is entitled to greater  
20 weight than the opinion of a nonexamining physician. *Lester v.*  
21 *Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995); *Pitzer v. Sullivan*,  
22 908 F.2d 502, 506 (9th Cir. 1990). The ALJ must provide "clear and  
23 convincing" reasons for rejecting the uncontradicted opinion of an  
24 examining physician. *Lester*, 81 F.3d at 830-831; *Pitzer*, 908 F.2d  
25 at 506. The opinion of an examining doctor, even if contradicted by  
26 another doctor, can be rejected only for "specific" and "legitimate"  
27 reasons that are supported by substantial evidence in the record.  
28 *Andrews*, 53 F.3d at 1043.

1        Rejecting a treating physician's opinion in favor of a  
2 non-treating physician's opinion, without more, is legally  
3 erroneous. See *Lester*, 81 F.3d at 830-31 (ALJ's rejection of  
4 treating physician's opinion was improper where it was based solely  
5 upon the testimony of a non-treating, non-examining medical  
6 advisor). Indeed, a non-examining medical advisor's testimony  
7 cannot "by itself constitute substantial evidence that warrants a  
8 rejection of either the treating doctor's or the examining  
9 psychologist's opinion." *Id.* at 833; *Pitzer*, 908 F.2d at 506  
10 ("non-examining physicians' conclusion[s], with nothing more" do not  
11 constitute substantial evidence controverting an examining  
12 physician's opinion.)

13        In finding Plaintiff was not disabled, the ALJ indicated he  
14 assigned "significant weight to accepted medical sources while  
15 appropriately discounting the weight of evidence from non-accepted  
16 sources." (Tr. 18.) The ALJ specified that he gave lesser weight to  
17 social workers' diagnoses and opinions. (Tr. 18.) With regard to  
18 the opinions from "accepted" medical sources, the ALJ concluded that  
19 "the primary contrast between Dr. Gentile and Mr. Caldwell's  
20 opinions [are] regarding the level of difficulty the claimant  
21 experiences in his social activities." (Tr. 18.) The ALJ concluded  
22 that Dr. Gentile's assessment was more accurate. (Tr. 18.)

23        On August 25, 2006, Mary A. Gentile, Ph.D., completed a  
24 Psychiatric Review Technique form. (Tr. 281-94.) In that check-  
25 the-box form, Dr. Gentile indicated that Plaintiff's impairment was  
26 moderate in maintaining social function and he had mild limitations  
27 in restriction of daily activities and difficulties maintaining  
28 concentration, persistence and pace. (Tr. 291.) Dr. Gentile also



1 completed a Mental Residual Functional Capacity Assessment form.  
2 (Tr. 295-97.) Dr. Gentile assessed Plaintiff with three moderate  
3 limitations - in the ability to work in coordination with or  
4 proximity to others without being distracted by them, the ability to  
5 interact appropriately with the general public and the ability to  
6 get along with coworkers or peers without distracting them or  
7 exhibiting behavior extremes. (Tr. 295-96.) Dr. Gentile's  
8 narration indicated Plaintiff was able "to understand, remember, and  
9 carry out simple and multi-step instruction. He would be more  
10 successful in a secluded or individual work environment." (Tr.  
11 297.) Dr. Gentile also opined that Plaintiff would do best away  
12 from the general public, with limited coworker interaction, and he  
13 would be able to adjust to change, set realistic goals, avoid  
14 hazards and travel or use public transportation. (Tr. 297.)  
15 Finally, it appears Dr. Gentile dismissed all non-accepted medical  
16 source treating providers: "insufficient for Title II DLI 6/30/04;  
17 earlier records from Grant County MH are all non-doctoral  
18 providers." (Tr. 293.)

19 On April 26, 2005, Sean Caldwell, M.S. (Cand.), examined  
20 Plaintiff and produced an evaluation that was adopted by Mahlon  
21 Dalley, Ph.D. (Tr. 152-55.) Mr. Caldwell reported that while  
22 Plaintiff said he had an obsessive fear of germs that impacted his  
23 social interaction, he was able to sit in the lobby and interact  
24 with others prior to his appointment, and to shake hands, open door  
25 handles and put his hands on surfaces of tables. (Tr. 152.) At the  
26 time of the evaluation, Plaintiff was taking Paxil and Lorazepam.  
27 (Tr. 152.) His results on the MMPI-2 indicate he experiences severe  
28 emotional distress characterized by dysphoria, agitation, worrying

1 and anhedonia. (Tr. 154.) Mr. Caldwell diagnosed panic disorder  
2 without agoraphobia, personality disorder not otherwise specified  
3 with borderline features. (Tr. 154.) Mr. Caldwell found Plaintiff  
4 was markedly impaired in his ability to interact appropriately in  
5 public contacts and in the ability to respond appropriately to and  
6 tolerate the pressures and expectations of a normal work setting.  
7 (Tr. 158.) Mr. Caldwell explained that "features of Peter's panic  
8 disorder may affect his ability to tolerate the social expectations  
9 and pressures of a normal work environment... [O]nce Mr. Martinez's  
10 symptoms have stabilized, he should be able to return to work."  
11 (Tr. 155; 157.)

12 On July 28, 2005, Sean Caldwell, M.S. (Cand.), examined  
13 Plaintiff a second time and produced an evaluation that was again  
14 adopted by Mahlon Dalley, Ph.D. (Tr. 160-64.) Plaintiff's results  
15 on the MMPI-2 again indicated he experiences severe emotional  
16 distress characterized by dysphoria, agitation, worrying and  
17 anhedonia. (Tr. 162.) Mr. Caldwell found Plaintiff remained  
18 markedly impaired in his ability to interact appropriately in public  
19 contacts and in the ability to respond appropriately to and tolerate  
20 the pressures and expectations of a normal work setting. (Tr. 167.)  
21 He was also moderately impaired in several categories. (Tr. 166-  
22 67.) Similar to his April evaluation, Mr. Caldwell maintained the  
23 opinion that "[w]hile features of his personality disorder may  
24 affect his personal and professional relationships, features of his  
25 depressive and anxiety disorders will likely affect his ability to  
26 tolerate the social pressures and expectations of a normal work  
27 environment. . . . Once his symptoms stabilize, Mr. Martinez should  
28 be able to return to work." (Tr. 163.)

1 On de novo review, the record reveals the differences between  
2 Dr. Gentile's and Mr. Caldwell's assessments are more significant  
3 than a mere difference in assessed limitations related to "social  
4 activities." (Tr. 18.) Dr. Gentile found Plaintiff was able to  
5 work with three moderate limitations. (Tr. 295-96.) Mr. Caldwell,  
6 on the other hand, found Plaintiff was incapable of working until  
7 his symptoms stabilized. After both examinations, Mr. Caldwell  
8 concluded that Plaintiff's panic and/or personality disorder caused  
9 significant impairments in his ability to tolerate the social  
10 expectations and pressures of a normal work environment. (Tr. 155;  
11 157; 163.)

12 The social activities cited by the ALJ as support for adopting  
13 Dr. Gentile's assessment over Mr. Caldwell's included: "during the  
14 closed period, the claimant has been able to attend parties, go on  
15 long-distance trips, and visit with friends." (Tr. 18.)

16 In records that span over four years, evidence exists that  
17 Plaintiff attended two parties - the first party was during a trip  
18 to Seattle with a friend, in July 2003, before the beginning of the  
19 closed period. (Tr. 460.) The second party occurred in March 2006.  
20 Plaintiff left during the party because he began to experience a  
21 severe panic attack. He ended up in the hospital emergency room.  
22 (Tr. 170.)

23 One of Plaintiff's treatment goals was to "get out more" and  
24 socialize with friends. (Tr. 444-70; 493; 497.) Evidence exists  
25 Plaintiff took one trip to go crab fishing in July 2006, and at the  
26 appointment prior to departure, he requested an increase in his  
27 medications because he recently had experienced increasing panic  
28 episodes. (Tr. 266.)

1 The reasons relied upon by the ALJ that justify giving more  
2 weight to Dr. Gentile's assessment are neither specific and  
3 legitimate, nor supported by substantial evidence. The ALJ failed  
4 to give specific and legitimate reasons supported by substantial  
5 evidence for rejecting Mr. Caldwell and Dr. Dalley's assessments of  
6 Plaintiff's limitations.

7 Moreover, Dr. Gentile's assessment that Plaintiff is "able to  
8 understand, remember, and carry out simple and multi-step  
9 instruction" is not supported by substantial evidence, and is  
10 contradicted by other opinion testimony. (Tr. 297.) For example,  
11 Heidi Whitney, M.S., evaluated Plaintiff on January 4, 2005, and  
12 found Plaintiff had marked impairments in his ability to understand,  
13 remember and follow complex instructions. (Tr. 481.) The  
14 assessment from Brian G. Milliken, MA, LMCH, on June 24, 2005,  
15 echoes this finding of marked impairment in the ability to  
16 understand, remember and follow complex instructions. (Tr. 477-78.)  
17 Because Dr. Gentile's assessment is not supported by the record, and  
18 because that assessment does not constitute substantial evidence  
19 controverting the examining providers, the ALJ erred by adopting Dr.  
20 Gentile's assessment and rejecting the other examining providers.

21 **2. Other source medical opinions.**

22 An ALJ may discount the opinion of a non-acceptable medical  
23 source by providing reasons that are "germane" to that source. Cf.  
24 *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005); *Dodrill v.*  
25 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Such reasons include  
26 conflicting medical evidence, prior inconsistent statements, or a  
27 claimant's daily activities. *Lewis v. Apfel*, 236 F.3d 503, 511-12  
28 (9th Cir. 2001). In this case, the ALJ indicated he discounted "the

1 weight of evidence from non-accepted sources. Specifically, the  
2 undersigned has given lesser weight to social workers' diagnoses and  
3 opinions that the claimant was either markedly or severely limited  
4 in his functions." (Tr. 18.) Without further elaboration, the ALJ  
5 rejected the opinions of Heidi Whitney, M.S., Brian G. Milliken,  
6 M.A., LMCH, and Katheryn Espinoza, M.S.W., based solely on the non-  
7 accepted medical source status. This was error.

8       The fact that the identified examiners were not acceptable  
9 medical sources does not mean that, under the law, these opinions  
10 must automatically be given less weight. The opinion of a medical  
11 source other than an accepted medical source may be accorded weight  
12 depending on the factors listed in 20 C.F.R. § 416.927(c)— i.e., how  
13 long the source has known and how frequently the source has seen the  
14 individual, how consistent the opinion is with other evidence, the  
15 degree to which the source presents relevant evidence to support an  
16 opinion, how well the source explains the opinion, whether the  
17 source has a specialty or area of expertise related to the  
18 claimant's impairment, and any other factors that tend to support or  
19 refute the opinion. See SSR 06-3p. Social Security Ruling 06-3p  
20 specifically states that, "depending on the particular facts in a  
21 case, and after applying the factors for weighing opinion evidence,  
22 an opinion from a medical source who is not an 'acceptable medical  
23 source' may [even] outweigh the opinion of an 'acceptable medical  
24 source,' including the medical opinion of a treating source." SSR  
25 06-3p.

26       In this case, it is not apparent that the ALJ made a complete  
27 consideration of the above factors specified in § 416.927(c) in  
28 evaluating the "other source" opinions. The assessments of

1 Plaintiff by the "other source" medical providers are largely  
2 consistent, supported by the record, and discounting the opinions  
3 because they were not from "acceptable medical sources" was error.

4 **3. Remand.**

5 The court has discretion in deciding whether to remand for  
6 further proceedings or for immediate payment of benefits. *Harman*,  
7 211 F.3d at 1178. The issue turns on the utility of further  
8 proceedings. A remand for an award of benefits is appropriate when  
9 no useful purpose would be served by further administrative  
10 proceedings or when the record has been fully developed and the  
11 evidence is insufficient to support the Commissioner's decision.  
12 *Strauss v. Comm'r*, 635 F.3d 1135, 1138 (9th Cir. 2011) (quoting  
13 *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004)). The  
14 reviewing court may not award benefits punitively, and must conduct  
15 a credit-as-true analysis to determine if a claimant is disabled  
16 under the Act. *Id.* at 1138.

17 Under the "crediting as true" doctrine, evidence should be  
18 credited and an immediate award of benefits directed where "(1) the  
19 ALJ has failed to provide legally sufficient reasons for rejecting  
20 such evidence, (2) there are no outstanding issues that must be  
21 resolved before a determination of disability can be made, and (3)  
22 it is clear from the record that the ALJ would be required to find  
23 the claimant disabled were such evidence credited." *Id.* The  
24 "crediting as true" doctrine is not a mandatory rule in the Ninth  
25 Circuit, but leaves the court flexibility in determining whether to  
26 enter an award of benefits upon reversing the Commissioner's  
27 decision. *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003)  
28 (citing *Bunnell*, 947 F.2d 341, 348 (9<sup>th</sup> Cir. 1991)). The court must

1 finally determine whether the record clearly requires an award of  
2 benefits after the improperly rejected evidence is credited.  
3 *Strauss*, 635 F.3d at 1138.

4 Listing 12.06 reads as follows:

5 In these disorders anxiety is either the predominant  
6 disturbance or it is experienced if the individual  
7 attempts to master symptoms; for example, confronting the  
8 dreaded object or situation in a phobic disorder or  
9 resisting the obsessions or compulsions in obsessive  
10 compulsive disorders.

11 The required level of severity for these disorders is met  
12 when the requirements in both A and B are satisfied, or  
13 when the requirements in both A and C are satisfied.

14 A. Medically documented findings of at least one of the  
15 following:

16 1. Generalized persistent anxiety accompanied by three out  
17 of four of the following signs or symptoms:

- 18 a. Motor tension; or
- 19 b. Autonomic hyperactivity; or
- 20 c. Apprehensive expectation; or
- 21 d. Vigilance and scanning;

22 Or

23 2. A persistent irrational fear of a specific object,  
24 activity, or situation which results in a compelling  
25 desire to avoid the dreaded object, activity, or  
26 situation; or

27 3. Recurrent severe panic attacks manifested by a sudden  
28 unpredictable onset of intense apprehension, fear, terror  
and sense of impending doom occurring on the average of at  
least once a week; or

4. Recurrent obsessions or compulsions which are a source  
of marked distress; or

5. Recurrent and intrusive recollections of a traumatic  
experience, which are a source of marked distress;

And

B. Resulting in at least two of the following:

- 1 1. Marked restriction of activities of daily living; or
- 2 2. Marked difficulties in maintaining social functioning;  
3 or
- 4 3. Marked difficulties in maintaining concentration,  
5 persistence, or pace; or
- 6 4. Repeated episodes of decompensation, each of extended  
7 duration.  
8 or
- 9 C. Resulting in complete inability to function  
independently outside the area of one's home.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.06.

10 The other source opinions included the January 4, 2005,  
11 evaluation by Heidi Whitney, M.S. Ms. Whitney found Plaintiff had  
12 severe impairments related to verbal expression of anxiety or fear,  
13 social withdrawal, the ability to relate appropriately to co-workers  
14 and supervisors, and the ability to respond appropriately to and  
15 tolerate the pressures and expectations of a normal setting. (Tr.  
16 481-82.) She also found he had marked impairments of depressed  
17 mood, paranoid behavior, global illness, the ability to understand,  
18 remember and follow complex instructions, the ability to learn new  
19 tasks, the ability to exercise judgment and make decisions, and the  
20 ability to interact appropriately in public contacts. (Tr. 481.)  
21 Ms. Whitney noted that medication "helped him a great deal to  
22 function on [a] daily basis." (Tr. 483.) Ms. Whitney concluded  
23 that Plaintiff was "acutely mentally ill" and noted that while  
24 Plaintiff likes to work, he has not been able to hold down a job for  
25 more than a couple of months because he cannot handle "being under  
26 someone's control." (Tr. 483.)

27 On June 24, 2005, Brian G. Milliken, MA, LMCH, evaluated  
28 Plaintiff and found he had a severe impairment in global illness



1 based upon the intensity and pervasiveness of all symptoms and  
2 impairments of functioning, along with marked impairments in  
3 depressed mood, the ability to understand, remember and follow  
4 complex instructions, and in the ability to respond appropriately to  
5 and tolerate the pressure and expectations of a normal work setting.  
6 (Tr. 477-78.) He assessed Plaintiff with multiple moderate  
7 impairments. (Tr. 477-78.) Mr. Milliken concluded that Plaintiff  
8 was "acutely mentally ill" and noted that he "appear[ed] to be  
9 progressing toward treatment goals." (Tr. 479.)

10 On January 1, 2006, Katheryn E. Espinoza, MSW, examined  
11 Plaintiff and completed a Psychological/Psychiatric Evaluation form.  
12 (Tr. 472-74.) Ms. Espinoza found Plaintiff had a severe impairment  
13 relating to his ability to respond appropriately to and tolerate the  
14 pressure and expectations of a normal work setting. (Tr. 474.) Ms.  
15 Espinoza also assessed Plaintiff with multiple marked impairments  
16 including depressed mood, verbal expression of anxiety or fear,  
17 social withdrawal, motor agitation, thought disorder, global  
18 illness, the ability to exercise judgment and make decisions, the  
19 ability to interact appropriately in public contacts, and the  
20 ability to control physical or motor movements and maintain  
21 appropriate behavior. (Tr. 472-74.) Ms. Espinoza noted that due to  
22 his OCD, Plaintiff is repetitive in several of his actions and this  
23 impairs his judgment and ability to perform tasks, and also limits  
24 his abilities in the social realm. (Tr. 474.) Ms. Espinoza opined  
25 that Plaintiff "can learn how to control aspects of his OCD but he  
26 will always have to deal with this disorder." (Tr. 47.) She  
27 concluded Plaintiff was "chronically mentally ill." (Tr. 475.)

28 In this case, Plaintiff's counsel posed a hypothetical to the

1 vocational expert incorporating the improperly rejected medical  
2 opinions:

3 Q. I'd like you to assume, Mr. McKinney, that similarly  
4 this individual would have no exertional limitations,  
5 but nonexertional limitations would be as follows. This person would have severe limitations in the  
6 ability to relate appropriately to coworkers and supervisors and in the ability to respond  
7 appropriately to and tolerate the pressures and expectations of a normal work setting. Would have a  
8 marked limitation in the ability to understand, remember, and follow complex, more than two-step  
9 instructions. Would have moderate limitations in the ability to understand, remember and follow simple one  
10 or two-step instructions in the ability to learn new tasks, in the ability to exercise judgment and make  
11 decisions, and in the ability to interact appropriately in public contacts. With those  
12 limitations could such an individual perform past relevant work?

13 A: No, he could not.

14 Q. Is there any other work that such an individual could perform in the national economy?

15 A. I think with these limitations the person would not  
16 be able to maintain any form of competitive  
17 employment. I think the person would have difficulty  
18 with sheltered jobs.

18 (Tr. 48.) Plaintiff's counsel offered two additional hypotheticals  
19 that altered the severity of the impairments. The first alternate  
20 hypothetical included marked limitations in the ability to  
21 understand, remember, and follow complex, more than two-step  
22 instructions and in the ability to respond appropriately to and  
23 tolerate the pressures and expectations of a normal work setting.  
24 The individual also would have moderate limitations in the ability  
25 to understand, remember and follow simple one or two-step  
26 instructions in the ability to learn new tasks, in the ability to  
27 exercise judgment and make decisions, and in the ability to perform  
28 routine tasks, and the ability to control physical or motor

1 movements and maintain appropriate behavior. (Tr. 49.) The VE  
2 indicated that hypothetical person would not be able to maintain  
3 competitive employment. (Tr. 49.)

4 The second alternate hypothetical offered by Plaintiff's  
5 counsel described an individual who suffered severe limitations in  
6 the ability to respond appropriately to and tolerate the pressures  
7 and expectations of a normal work setting. Also, the person would  
8 have marked limitations in the ability to exercise judgment and make  
9 decisions, in the ability to interact appropriately in public  
10 contacts and in the ability to control physical or motor movements  
11 and maintain appropriate behavior. Additionally, the individual  
12 would have a moderate limitation in the ability to learn new tasks.  
13 (Tr. 49-50.) The VE indicated that hypothetical person would not be  
14 able to maintain competitive employment. (Tr. 50.)

15 When the other source medical opinions are properly credited,  
16 it is apparent that Plaintiff could not sustain work during the  
17 closed period. Because the evidence establishes that Plaintiff was  
18 unable to maintain employment during the closed period, remand for  
19 further administrative proceedings serves no useful purpose and is  
20 unwarranted.

#### 21 CONCLUSION

22 Having reviewed the record and the ALJ's findings, this court  
23 concludes the ALJ's decision is not supported by substantial  
24 evidence and is based on legal error. Because no remaining issues  
25 exist that must be resolved and it is clear from the record that  
26 Plaintiff is entitled to disability benefits for the closed period,  
27 the court REMANDS to the Commissioner of Social Security for an  
28 award of benefits. Accordingly,

